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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES LINZY FRANKLIN, Defendant and Appellant.	E047829 (Super.Ct.No. FVI019569) OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant James Linzy Franklin (hereafter defendant) appeals from the judgment entered after a jury found him guilty as charged on six counts that include one count of first degree murder (count 1), two counts of attempt to commit a home invasion robbery (counts 2 & 5), two counts of first degree burglary (counts 3 & 6), and one count of being a convicted felon in possession of a firearm (count 4). In connection with the first degree murder conviction, the jury also found true an allegation that defendant personally and intentionally discharged a firearm which proximately caused great bodily injury and death within the meaning of Penal Code section 12022.53, subdivision (d).[1] The charges stem from two separate incidents, one in December 2002, which is the basis for the charges alleged in counts 5 and 6, and the second in September 2003, which is the basis for the charges alleged in counts 1 through 4.

Defendant moved to sever trial on the 2002 charges from trial on the 2003 charges, a motion the trial court denied. Defendant challenges that ruling in this appeal. Defendant also claims that imposition of a firearm use enhancement under section 12022.53, subdivision (d) on defendant's first degree murder conviction violates the federal constitutional prohibition against double punishment for the same act. Defendant acknowledges that the California Supreme Court rejected this claim in *People v. Izaguirre* (2007) 42 Cal.4th 126, and also acknowledges that under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, this court is bound by that decision. He

[1] All statutory references are to the Penal Code unless indicated otherwise.

raises the issue in order to preserve it for possible review by the United States Supreme Court.

We conclude, as we explain below, that the trial court did not abuse its discretion in denying defendant's motion to sever trial. We also must reject defendant's double jeopardy claim. Therefore, we will affirm.

STATEMENT OF FACTS

The pertinent facts are undisputed. Therefore we take the facts from the parties' respective briefs

1.

2002 CRIMES

About 12:30 a.m. on December 25, 2002, Phillip Anjel was in bed when he heard noises in his house. Anjel took a .357 Magnum revolver with him when he went to investigate. Anjel heard voices coming from what he referred to as the game room. Someone was trying to open the locked door that connected the game room to the rest of Anjel's house. Anjel crouched down to conceal himself just as the door opened and an intruder who appeared to be armed with a gun entered the room. Anjel fired two shots after which the person fell over backward. Anjel then shined a flashlight into the game room and saw another person trying to open a door that led outside. Anjel fired twice as that person fled through the door and out of the house.

Anjel's shots killed the first intruder, later identified as Antonio Guerra. Guerra had been armed with an automatic handgun when Anjel shot him. San Bernardino

County Deputy Sheriff Danny Ritchea tracked footprints to and from Anjel's house. Those footprints confirmed two people had entered Anjel's house and one person left, running across Anjel's backyard, where the person climbed over a wall and continued running to the road.

At the request of another sheriff's deputy, Ritchea contacted defendant in order to determine whether his shoe prints matched those left by the intruder who had fled from Anjel's house. Defendant's prints did not match, but Ritchea noticed that a white van parked outside defendant's mobilehome had what appeared to be blood on the right front dash and on the backside of the front seats. There was also blood on the right rear exterior of the van that appeared as if it had been left when a bleeding person brushed up against the vehicle. Inside the van Ritchea found broken pieces of safety glass.

Defendant told Deputy Ritchea that he used the van to drive his friend Jesse Tafoya to the local hospital about 1:00 a.m. after Tafoya called him to say he had been hurt in a fight and needed help. According to defendant that is how the blood got on the van. When sheriff's deputies later searched Tafoya's apartment, they found his bloody clothing in a bathroom. Family members took Tafoya to the hospital sometime on December 25. According to Anjel, sometime before December 25, 2002, he had hired Tafoya's sister, Bernadette, to do work at his home.

2.

2003 CRIMES

On September 8, 2003, around 11:45 p.m., Nancy George and Allen Allison were in the bedroom of Allison's home in Big Bear when the door bell rang. George put on a robe and went to investigate. When she tried to turn on the porch light it did not work, although it had worked earlier that evening. Through a large window in the dining room George saw someone who appeared to be hiding at the corner of the house.

In the meantime, Allison came out of the bedroom and, before George could warn him, opened the front door. While Allison struggled to close the door against someone pushing the door from the outside, George ran to find a phone so she could call 911. George was in the garage when she heard a male voice say, "I'm going to shoot," after which she heard at least two gun shots. George found Allison on the floor with two gunshot wounds in his back. Allison was airlifted to Loma Linda University Hospital where he was placed in an induced coma in order to treat his various serious injuries. He went home after five months in the hospital but two months later was readmitted. Allison died in the hospital about a week after being readmitted from complications caused by the gunshot wounds.

A baseball cap and flashlight an assailant had left at Allison's home were traced to Vavao Faumui through DNA analysis. When interviewed by then Sergeant Hutchins of San Bernardino County Sheriff's Department, Faumui identified Robin Sherwood as a coparticipant. Sherwood told Hutchins that he had worked for Allison for a few months

in Allison's paving business but had quit. A few months before the attempted robbery, he and defendant went to Allison to ask him for jobs. Allison turned them down and afterward Sherwood mentioned to defendant that he had been to Allison's house a few times and knew that he kept cash in a safe. A few months later when they needed money, defendant suggested they steal the safe from Allison's house. Because Sherwood apparently would be recognized,[2] they decided he would lead the way to Allison's house and defendant, Faumui, and Jose Ceja would follow in another car.

In a later lineup, George identified defendant's voice as the one she had heard say "I'm going to shoot you." Sherwood and Ceja later confessed to their participation in the crime. Sherwood borrowed a car from Donald Jaramillo in order to drive from Barstow to Allison's house in Big Bear. Jaramillo testified that he went to Sherwood's apartment the morning after the shooting. Sherwood, Ceja, Faumui, and defendant were there. When Jaramillo confronted them about what had happened at Allison's house, defendant said, "I had to do it. The dude got loud."

Additional facts will be recounted below as pertinent to the issue defendant raises on appeal.

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[2] Nancy George knew Sherwood from the time he had worked for Allison. After she identified a photo of him at trial, she confirmed the district attorney's observation that Sherwood is "[k]ind of a memorable looking fellow."

DISCUSSION

1.

SEVERANCE MOTION

Defendant challenges the trial court's order denying his motion to sever trial on the charges stemming from the 2002 crimes from trial on the charges related to the 2003 crimes. In his motion defendant argued that severance was in the interests of justice because the crimes were the result of two separate incidents that were not connected in their commission, and were joined for trial so that the stronger case (counts 1–4) would "inflame the jury" and thereby bolster convictions on the weaker counts (counts 5 & 6). The trial court denied defendant's motion. In doing so, the trial court found that severance under section 954 was not appropriate because "arguably there is certainly a tie in between the counts with regard to Evidence Code [section] 1101(b)." Defendant renewed his severance motion after the case was assigned to a judge for trial. The trial judge also denied defendant's severance motion.

Section 954 provides in relevant part that, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ."

Offenses are of the same class of crime if they possess common characteristics or attributes. (*People v. Kemp* (1961) 55 Cal.2d 458, 476.) The crimes charged in this case share the characteristic that they involved night time residential burglaries that turned into attempted home invasion robberies when the home owner interceded. Because they have common characteristics, the crimes are the same class of crime and therefore were properly joined under section 954. The Supreme Court in *People v. Soper* (2009) 45 Cal.4th 759 (*Soper*) recently discussed the process by which we review denial of a motion to sever properly joined charges. We quote liberally from that decision.

"A defendant, to establish error in a trial court's ruling declining to sever properly joined charges, must make a '"*clear showing of prejudice* to establish that the trial court *abused its discretion* . . . ."' [Citation.] A trial court's denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling '"""falls outside the bounds of reason."""' [Citation.]" (*Soper*, *supra*, 45 Cal.4th at p. 774.) The Supreme Court "observed that 'in the context of properly joined offenses, "a party seeking severance must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial."' [Citations.]" (*Ibid.*)

"In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.' [Citation.] Although our assessment 'is necessarily dependent on the particular circumstances of each individual case, . . . certain criteria have emerged

to provide guidance in ruling upon and reviewing a motion to sever trial.' [Citation.]" (*Soper, supra*, 45 Cal.4th at p. 774.) "First, we consider cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence underlying these charges would not be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. [Citation.] Indeed, section 954.1 . . . codifies this rule—it provides that when, as here, properly joined charges are of the same class, the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges." (*Soper*, at pp. 774-775.)

"If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2)

whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Soper, supra,* 45 Cal.4th at p. 775, fn. omitted.)

In determining whether evidence is cross-admissible we begin with Evidence Code section 1101, which prohibits use of other crimes evidence to prove a person's disposition to commit crime and thus to prove the defendant's guilt on another charge. (Evid. Code, § 1101, subd. (a).) However, evidence that the defendant committed a crime other than the one for which the defendant is on trial is admissible under Evidence Code section 1101, subdivision (b) to prove some material fact in issue, such as motive, opportunity, intent, or identity, other than the defendant's bad character or propensity to commit crime. (Evid. Code, § 1101, subd. (b).)

As the Supreme Court explained in *People v. Ewoldt*, "[t]here exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: 'The least degree of similarity . . . is required in order to prove intent. . . .' [Citation.] By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity." (*Soper, supra*, 45 Cal.4th at p. 776, fns. & italics omitted, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

The record before the trial court at the time defendant made his motion to sever consisted of the charging document and the reporter's transcript of defendant's preliminary hearing. The evidence presented at that hearing and at trial are essentially the same. In the 2002 case, the issue was whether defendant participated in the burglary of Anjel's home by driving what colloquially is referred to as the getaway car. Defendant, as previously noted, told Deputy Ritchea that he did not participate in the burglary and only drove Tafoya to the hospital after Tafoya called and asked him for help. According to *Ewoldt*, "Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged." (*Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Therefore, evidence of defendant's participation in the 2003 burglary would be admissible in the 2002 case to prove defendant's participation in that crime if the two crimes are part of a common design or plan.

"To establish a common design or plan, the evidence must demonstrate not merely a similarity in the results, but '"such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations." [Citation.]' [Citation.]" (*People v. Balcom* (1994) 7 Cal.4th 414, 423-424 (*Balcom*), quoting *Ewoldt*, *supra*, 7 Cal.4th at pp. 393-394.) "To be relevant, the plan, as established by the similarities between the charged and uncharged offenses, need not be distinctive or unusual. Evidence that the defendant possessed a plan to commit the type of crime with which he or she is charged is relevant to prove the defendant employed that plan and committed the charged offense." (*Balcom*, at p. 424.)

The common features of the 2002 and 2003 charges are that both burglaries occurred very late at night, around midnight; more than one person participated in each burglary; at least one participant in each burglary was armed with a firearm; and a participant in each burglary either had personal knowledge of or information about the burglary location. The noted similarities support the inference that the two crimes were committed pursuant to a design or plan to commit burglaries. That inference, in turn, supports an inference that defendant participated in both of the charged offenses. (*Balcom*, *supra*, 7 Cal.4th at p. 424.)

In addition, evidence of each crime is cross-admissible to prove defendant's intent. As the Supreme Court observed in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, "a fact finder properly may consider admissible 'other crimes' evidence to prove intent, so long as (1) the evidence is sufficient to sustain a finding that the defendant committed both sets of crimes [citation], and further (2) the threshold standard articulated in *Ewoldt* can be satisfied—that is 'the factual similarities among the charges tend to demonstrate that in each instance the perpetrator harbored' the requisite intent. [Citation.] There is no requirement that it must be conceded, or a court must be able to assume, that the defendant was the perpetrator in both sets of offenses." (*Soper*, *supra*, 45 Cal.4th at pp. 778-779.)

Our conclusion that the evidence was cross-admissible to show common plan and design as well as to show defendant's intent ends our inquiry. As previously noted, "If the evidence underlying the charges in question would be cross-admissible, that factor

alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper*, *supra*, 45 Cal.4th at pp. 774-775.) Therefore, we conclude the trial court's denial of defendant's motion to sever was not an abuse of discretion.

2.

DOUBLE JEOPARDY CLAIM

In sentencing defendant on the first degree murder conviction, the trial court imposed a term of 25 years to life without the possibility of parole, based on the jury's true finding on a special circumstance allegation, plus an additional consecutive term of 25 years to life on the section 12022.53, subdivision (d) enhancement. Defendant contends, as previously noted, that imposition of the 25-years-to-life sentence enhancement under section 12022.53, subdivision (d) for use of a firearm that causes death during the commission of the crime violates the constitutional prohibition against double punishment for a single criminal act when, as in this case, the crime is murder.

Defendant acknowledges the Supreme Court addressed and rejected this precise claim in *People v. Izaguirre*, *supra*, 42 Cal.4th 126. We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) Therefore, we must reject defendant's challenge in this appeal.

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.